Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1994

Steven Lekoy,

Petitioner,

v.

Illinois Racing Board; Thomas J. Garvey, Ralph M. Gonzales, Farrel J. Griffin, Ray H. Garrison, and Irwin G. Jann, individually and in their official capacity as members of the Illinois Racing Board; Richard E. Garrett, Robert G. Ward, Timothy Schmidtz, Frank Deglamine and Robert Milburn, individually and in their official capacity as Stewards,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

LAWRENCE JAY WEINER
Counsel of Record
SCARIANO, KULA, ELLCH
AND HIMES, CHTD.
Two Prudential Plaza
180 North Stetson Street
Suite 3100
Chicago, Illinois 60601
(312) 565-3100

March, 1995

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QUESTIONS PRESENTED

Whether the regulatory scheme of the Illinois Racing Board that requires harness horsemen to consent to searches of their persons, stables, rooms, vehicles, or other places, and which contains only one limitation on the discretion of Illinois racing officials, viz., that the search be conducted "within the track enclosure at which a meeting is held, or other tracks or places where horses eligible to race at said race meeting are kept," survives constitutional scrutiny, and sufficiently curtails the unbridled discretion of racetrack officials in time, place, and scope to constitute a constitutionally adequate substitute for a warrant under New York v. Burger for a search conducted without probable cause.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

Steven LeRoy,

Petitioner,

v.

Illinois Racing Board; Thomas J. Garvey, Ralph M. Gonzales, Farrel J. Griffin, Ray H. Garrison, and Irwin G. Jann, individually and in their official capacity as members of the Illinois Racing Board; Richard E. Garrett, Robert G. Ward, Timothy Schmidtz, Frank Deglamine and Robert Milburn, individually and in their official capacity as Stewards,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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Petitioner, Steven LeRoy, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in

this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App. 1-32) is reported at 39 F.3d 711 (7th Cir. 1994). The opinions of the district court (App. 73-95, 145-184, 190-228, 277-292) are unreported.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its opinion on October 27, 1994 (App. 1-32). The order denying the petition for rehearing with suggestion of rehearing en banc was entered on December 28, 1994 (App. 33-34). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Fourth Amendment to the Constitution of the United States, provides:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Eleventh Amendment to the Constitution of the United States, provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Fourteenth Amendment to the Constitution of the United States, provides, inter alia:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes

Title 42, United States Code, Section

1983, provides in pertinent part:

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of the State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

* * *

Ill. Rev. Stats. 1985, 230 ILCS 59(c), provides (Emphasis supplied):

The Board, and any person or persons to whom it delegates this power, is vested with the power to enter the office, horse race track, facilities and other places of business of any organization licensee to determine whether there has been compliance with the provisions of this Act and its rules and regulations.

Regulations

Illinois Racing Board Rule 25.19, 11 Illinois Administrative Code 1325.190, provides in pertinent part (Emphasis supplied):

(a) The Illinois Racing Board or the state steward investigating for violations of law

or the Rules and Regulations of the Board, shall have the power to permit persons authorized by either of them to search the person, or enter and search the stables, rooms, vehicles, or other places within the track enclosure at which a meeting is held, or other tracks or places where horses eligible to race at said race meeting are kept, of all persons licensed by the Board, and of all employees and agents of any race track operator licensed by said Board; and of all vendors who are permitted by said race track operator to sell and distribute their wares and merchandise within the race track enclosure, in order to inspect and examine the personal effects or property on such persons or kept in such stables, rooms, vehicles, or other places as aforesaid. Each of such licensees, in accepting a license, does thereby irrevocably consent to such search as aforesaid and waive (sic) and release (sic) all claims or possible actions for damages that he may have by virtue of any action taken under this rule. Each employee of a licensed operator, in accepting his employment, and each vendor who is permitted to sell and distribute his merchandise within the race track enclosure, does thereby irrevocably consent to such search as aforesaid and waive and release all claims or possible actions for damages they may have by virtue of any action taken under this rule. Any person who refuses to be searched pursuant to this rule may have his license suspended or revoked.

(b) The Illinois Racing Board delegates the authority to conduct inspections and

searches, under this rule, to the Chief Investigator of the Illinois Racing Board and to Special Agents of the Illinois Bureau of Investigation, or other designees of the Department of Law Enforcement assigned, from time to time, assist the Chief Investigator in his duties. (Source: Amended May 9, 1975; filed May 15, 1975)

Illinois Racing Board Rule C9.10(a), 11 Illinois Administrative Code, Section 509.100, provides:

a) Possession of a Hypodermic Needle or Syringe Prohibited

No person, except a veterinarian, shall have in his possession within any racetrack enclosure any hypodermic syringe or needle or any instrument capable of being used for the injection into any horse of any chemical substance.

Illinois Racing Board Rule 20.1, 11 Illinois Administrative Code, Section 1320.10, provides:

Improper conduct

No owner, trainer, driver, attendant of a horse, or any other person shall use improper language to an official, or be guilty of any improper conduct toward such officers or judges or persons serving under their orders, such improper language or conduct having reference to the administration of the course, or of any race thereon.

Illinois Racing Board Rule 22.3, 11 Illinois Administrative Code, Section 1322.30, provides:

Definition of Suspension

Whenever the penalty of suspension is prescribed in these rules, it shall be construed to mean an unconditional exclusion and disqualification from the time of receipt of written notice of suspension from privileges and uses of the course and grounds of a track during the progress of a race meeting, unless otherwise specifically limited when such suspension is imposed, such as a suspension from driving. A suspension or expulsion of either a husband or wife shall apply in each instance to both the husband and wife. The suspension becomes effective when notice is given unless otherwise specified.

STATEMENT

This case involves the search by Illinois law enforcement agents of a vehicle driven, but not owned, by petitioner Steven LeRoy ("Petitioner" or "LeRoy") on the grounds of Maywood Park Racetrack, which search allegedly was "consented" to solely because respondent

Illinois Racing Board ("IRB") Rule 25.19 (text supra at pp: 4-5) required consent as a condition to the obtainment and maintenance of his racing license (Second Amended Complt., par. 6; App. 257). There was no probable cause for said search (Id.; see also Request for Admission, para. 6, at App. 236-237, and Defendants' Response to Plaintiff's Request for Admission, para. 6, at App. 250).

Notwithstanding the findings of the IRB that the syringe and needle found as a result of the search contained no prohibited substances and was "clogged"; that "there was no evidence that the needle was capable of being used for injection into any horse of any chemical substance" (Second Amended Complt., par. 7; App. 257-258), and that the horses driven and to be driven by petitioner were tested and found

not to have been administered any prohibited substances or medication (Second Amended Complt., pars. 8 and 10; App. 258-259), the petitioner and his horses were excluded by the respondents Illinois Racing Board and Stewards and then suspended for 90 days from all tracks licensed by the IRB for violating IRB Rule C9.10(a) (text supra at p. 6) (Second Amended Complt., pars. 9-12; App. 258-263).

In addition, pursuant to IRB Rules 20.1 and 22.3 (text supra at pp. 6-7) and based upon the previously alleged unconstitutional search and sanctions, petitioner was suspended for an additional 30 days for being observed on the premises of Sportsman's Park during his suspension, and was concurrently fined $500.00 and placed on probation through December 31, 1988, for "using offensive and profane

language" towards an IRB official (Second Amended Complt., par. 13; App. 263-264).

Lastly, on August 4, 1988, allegedly based upon the aforesaid prior rule violations and another alleged violation of Rule 20.1 for the use of "threatening and profane language," petitioner was suspended and denied the privileges and use of the grounds of all racetracks under the jurisdiction of the IRB for the balance of the year 1988 (Second Amended Complt. par. 14; App. 264-265).

Petitioner filed his complaints in the United States District Court for the Northern District of Illinois, Eastern Division, invoking jurisdiction under 28 U.S.C. §§ 1331 and 1343 (Complts. par 1; App. 37, 97, and 254), and alleged that the aforesaid actions and conduct were in violation and derogation of his "rights

under 42 U.S.C. 1983 and/or the fourth and/or fourteenth amendments to the Constitution of the United States" (Second Amended Complt. par. 16; App. 266); that the aforesaid IRB Rules, policies, and/or customs under which LeRoy was "searched, excluded, suspended, fined, penalized and denied his privileges and use of the grounds of all racetracks under the jurisdiction of the" IRB, were "unlawful, overbroad, arbitrary, capricious, unreasonable, a denial of the equal protection of the laws, and/or otherwise unconstitutional on their face and/or as applied to the facts and circumstances of the case" (Second Amended Complt. par. 17; App. 266-267); that the respondents denied petitioner "the equal protection of the laws by reason that defendants' conduct and actions were effected for an invidious

purpose, namely to punish LeRoy for the exercise and assertion of his constitutional rights, and/or deliberately based upon an unjustifiable standard, i.e., the 'consent' based upon the same regulatory program promulgated by the same defendants held by the District Court and the Seventh Circuit United States Court of Appeals to have been unauthorized and unconstitutional prior and subsequent to the actions contained herein," (citing Serpas v. Schmidt, infra), and that the sanctions imposed by respondents "against LeRoy were substantially disparate and differential to those imposed against other horsemen similarly situated, as evidenced by the Stewards' rulings attached to the Amended Complaint as Group Exhibit "G" and incorporated herein by this reference, and the failure of the defendants to impose any

sanctions upon either the owner of the vehicle involved herein or upon the passenger of the automobile under whose seat the unusable needle and syringe were located in a pile of rubbish and debris" (Second Amended Complt. par. 18, App. 267-269); that the respondents knew, or reasonably should have known that their conduct and actions were in violation of LeRoy's rights under 42 U.S.C. Sections 1983 and/or the Fourth and/or Fourteenth Amendments to the Constitution of the United States and were "on notice" that their actions violated clearly established law (Second Amended Complt. par. 19; App. 269-270; see also Request for Admission, par. 16, at App. 246, and Defendants' Response to Plaintiff's Request for Admission at App. 252); and that unless restrained and enjoined, the respondents

would continue to violate the aforesaid constitutional and/or statutory rights of LeRoy and other owners, drivers and trainers of standardbred race horses under their jurisdiction in the State of Illinois (Second Amended Complt. par. 20, App. 270).

In Count I of the Second Amended Complaint, petitioner prayed that the district court find, adjudge, and declare that the conduct and actions of the respondents were in violation of his constitutional and/or statutory rights; that the court order the respondents to rescind, vacate, remove, and expunge the exclusions, suspensions, fines and/or penalty; that petitioner be declared to be in good standing and reinstated to all rights and privileges; that a preliminary and, upon the trial of the cause, a permanent injunction be issued against the

respondent IRB and the individual defendants, individually and in their official capacity, restraining and enjoining them from violating the constitutional and/or statutory rights involved herein with respect to LeRoy and all other owners, drivers, and trainers and standardbred race horses under their jurisdiction in the State of Illinois; and for reasonable attorney's fees and costs (Second Amended Complt., Count I, Prayer, App. 271-272).

In addition, in Count II of the Second Amended Complaint, petitioner alleged that the conduct and actions of the respondents were taken under color of state law and caused the petitioner to be deprived of his rights, privileges, and immunities secured by the Constitution and laws of the United States (Second Amended Complt. par. 22,

App. 273); that by reason of respondents' conduct and actions, the petitioner suffered substantial damage, loss, and injury, including loss of income, the stigma of the suspensions and exclusion, the deprivation of his career and means of earning a living, and substantial mental pain, distress, anguish, and suffering (Second Amended Complt. par. 23, App. 273-274); that the individual respondents acted intentionally and/or "with reckless or callous indifference to and/or disregard of LeRoy's federally protected rights"; and that punitive damages should be imposed against "all such respondents who are found upon trial to have had such intention, indifference to, and/or disregard to the aforesaid constitutional and/or statutory rights" (Second Amended Complt. Count II, par. 24; App. 274). In Count II of the

Second Amended Complaint, petitioner sought compensatory and punitive damages against each of the respondents (except the Illinois Racing Board) individually and personally, as well as attorney's fees and costs (Second Amended Complt. Prayer, App. 275-276).

The district court dismissed both the original and amended complaints (App. 73-96; 145-184) and a Judgment in a Civil Case was entered December 20, 1990 (App. 184-185). Following petitioner's appeal to the United States Court of Appeals for the Seventh Circuit in Case No. 91-1166, the Seventh Circuit's Order remanding the case for clarification (App. 185-186), the entry by the district court of its Amended Memorandum Opinion and Order (App. 187-229), and petitioner's filing of his Second Amended Complaint (App. 254-276), the

respondents again filed another motion to dismiss, which motion was granted "with prejudice" in another Memorandum Opinion and Order (App. 277-292), Minute Order (App. 293), and Judgment in a Civil Case (App. 294).

On October 27, 1994, the United States Court of Appeals for the Seventh Circuit issued its opinion affirming the dismissals, Circuit Judge Wellford (sitting by designation) concurring in part and dissenting in part (App. 1-32). On December 28, 1994, the Court of Appeals entered an Order denying the petition for rehearing with suggestion of rehearing en banc (App. 33-34). On January 5, 1995, the Seventh Circuit issued its Mandate (App. 34-35). On January 9, 1995, the Motion For Stay of Mandate pending disposition by this Court was denied (App. 36).

REASONS FOR GRANTING THE PETITION

This appeal is of exceptional importance because the decision of the panel completely vitiates the Fourth Amendment under the closely regulated industry exception, and is in apparent conflict with this Court's decision in New York v. Burger, the Seventh Circuit's decisions in Serpas v. Schmidt, Schaill v. Tippecanoe County School Corporation, and McGann v. Northeast Illinois Regional Commuter Railroad Corporation, the Tenth Circuit's decision in V-1 Oil Company v. State of Wyoming Department of Environmental Quality, and the Illinois Appellate Court's decision in Hansen v. Illinois Racing Board.

ARGUMENT

The Fourth Amendment has now been "killed" in closely regulated industries

and the exception is now the rule. Unless reversed, all searches conducted under "consents" required as a precondition for participation in closely regulated industries will be constitutional, irrespective of the lack of probable cause, and notwithstanding the absence of any statutory or regulatory limitations on the unbridled discretion of the law officials in time, place, and scope.

This action involves the search by law enforcement agents of a vehicle driven, but not owned, by petitioner LeRoy on the grounds of Maywood Park Racetrack, which search allegedly was "consented" to solely because Illinois Racing Board Rule 25.19 (text supra) required consent as a precondition to the obtainment and maintenance of his racing license. There was no probable cause for said search.

Notwithstanding the findings of the IRB that the syringe and needle found as a result of the search contained no prohibited substances and was "clogged," that "there was no evidence that the needle was capable of being used for injection into any horse of any chemical substance," and that the horses driven and to be driven by LeRoy were tested and found not to have been administered any prohibited substances or medication, LeRoy and his horses were excluded by the defendant Stewards and then suspended for 90 days from all tracks licensed by the IRB for violating IRB Rule C9.10(a) (text supra).

In addition, pursuant to IRB Rules 20.1 and 22.3 (text supra) and pyramided upon the previously alleged unconstitutional search and sanctions, LeRoy was suspended for an additional 30

days for being observed on the premises of Sportsman's Park during his suspension, and was concurrently fined $500.00 and placed on probation through December 31, 1988, for "using offensive and profane language" towards an IRB official; and then, for another alleged violation of Rule 20.1 for the use of "threatening and profane language," was suspended and denied the privileges and use of the grounds of all racetracks under the jurisdiction of the IRB for the balance of the year 1988.

In a sophistic attempt to support its sua sponte determination that "the search did not violate LeRoy's rights at all"[1];

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[1] The panel majority raised and decided this issue for the first time on appeal stating (39 F.3d at 713; App. 7-8; citations omitted): "Although defendants have not sought to defend Rule 25.19, the merits of the constitutional claim are an antecedent issue whenever the defendants plead immunity, one we may consider without regard to the litigants' tactical

avoid the qualified immunity and implied consent issues, further "bury" Serpas v. Schmidt, 827 F.2d 23, 34 (7th Cir. 1987), cert. denied, 485 U.S. 904 (1988)[2], and circumvent the fact that the search of the truck driven by LeRoy was without probable cause[3], the panel majority relies upon its en banc decision in Dimeo v. Griffin, 543

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decisions."

[2]By the blind "luck" of the law, two of petitioner's Seventh Circuit panel, Circuit Judges Posner and Easterbrook, had dissented from the denial of rehearing en banc in the Serpas case.

[3] The district court granted respondents' motion to dismiss the Second Amended Complaint, which alleged that there was no probable cause for the search; see also Request for Admission and Defendants' Response to Plaintiff's Request for Admission (App. 236-237; 250). Inexplicably, the majority opinion makes no reference to this fact. Moreover, contrary to the inference intended (39 F.3d at 713; App.9), in California v. Acevedo, 500 U.S. 565, 111 S.Ct. 1982, 1991 (1991), this Court iterated the need for probable cause in vehicular searches.

F.2d 679 (7th Cir. 1991) (en banc))[4].

However, although Dimeo does establish the Seventh Circuit's most recent divided determination that Illinois horse racing officials can constitutionally promulgate rules requiring random urinalysis testing without person-specific cause or warrants under the closely regulated industry exception[5], the case did not consider or

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[4] The majority panel also applied Dimeo retroactively purportedly under Harper v. Virginia Department of Taxation, 113 S.Ct. 2510 (1993), and Lockhard v. Fretwell, 113 S.Ct. 838, 844 (1993). The dissent does not accept such an application (39 F.3d at 718; App. 31), Wellford, Circuit Judge, concurring in part and dissenting in part. In addition, Petitioner respectfully contends that these cases appear to apply the doctrine only to determinations of and by this Court.

[5] For this reason, the issue of whether the Court's "judgmental, forward-looking, balance-striking, probablistic assessment" in Dimeo (943 F.2d at 681) eviscerating certain constitutional protections is in consonance with National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) and Skinner v. Railway

decide the issue involved in this case, i.e., whether the statutory or regulatory scheme constituted "a constitutionally adequate substitute for a warrant" by "carefully" limiting the discretion of the race track officials "in time, place, and scope." New York v. Burger, 482 U.S. 691, 703 (1987), citing United States v. Biswell, 406 U.S. 311, 315 (1972).

Significantly and determinatively, in Dimeo the IRB's newly promulgated drug testing regulations more than adequately limited the unbridled discretion of the racing officials. The urine testing was truly random, and "carefully"

Labor Executive's Association, 489 U.S. 602 (1989), wherein the regulations narrowly and specifically defined the permitted intrusions, will have to wait resolution by this Court.

circumscribed.[6] To make the obvious

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[6] The Illinois Racing Board's guidelines for implementation of its substance abuse rule were summarized by the Court of Appeals in its initial decision in Dimeo, 924 F.2d, 664, 668 (7th Cir. 1991), as follows:

A. Random Testing

The Board determines the volume and frequency of random testing at each race meet, as well as which selected racing programs are subject to testing. Guidelines at 2. The names of all licensees who appear as participants on the official program are placed in a locked container secured by the race stewards, the stewards being the on-site state supervisors of the racing meet. A steward then may draw up to five names of licensees from the container, with a representative of the Guild, the Illinois Horseman's Benevolent and Protective Association, or the Illinois Harness Horseman's Association having been invited to witness the selection process. Rule § 508.80(c). Following the drawing the stewards locate and notify the licensees selected for random testing. Each licensee drawn must report to the designated sample collection area and provide a urine sample to the stewards or their designee before the last race on that day's racing program. Rule § 508.80(d); Guidelines at 2.

No licensee is required to provide a sample more than three times in a race

explicit, the search of the truck driven by LeRoy was not random, and the regulations involved in this case (IRB Rule 25.19, supra) contain no restrictions whatsoever except as to place, i.e., the searches must be conducted "...within the track enclosure at which a meeting is held, or other tracks or places where horses eligible to race at said race meeting are kept," which is not a meaningful or sufficient restriction. Moreover, despite the panel majority's sua sponte proclamation of Illinois law that

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meet. Rule § 508.80(e); Guidelines at 2. Judge Shadur found that the Board has now agreed, though it does not appear in the Rule or Guidelines, that a licensee will not be randomly tested more than five times per year. If a licensee's name is drawn more than three times in any meet (or presumably more than five times in any year), the stewards will disregard the selection, return the name to the container, and draw another name. Rule § 508.80(e); Guidelines at 2-3. To implement that limitation the stewards maintain a confidential log of all licensees selected for random testing. Id. at 3.

"230 ILCS 5/9(c) unquestionably authorizes Rule 25.19 to the extent it applies to vehicular searches on the grounds of race tracks" (39 F.3d at 713; App.9), the statute does not authorize the search of vehicles, but only "to enter the office, horse race track, facilities, and other places of business of any organization licensee...." In this respect these regulations, like those in Serpas relating to dormitory rooms (827 F.2d at 28), lack statutory authority.[7]

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[7] It is noted that the Illinois Appellate Court in Hansen v. Illinois Racing Board, 179 Ill.App.3d 353, 359-362 (1st Dist. 1989), did not make such an interpretation of Illinois law when it found the regulation to be unconstitutional on its face. Although it is acknowledged that the Illinois Appellate Court is not the highest State court, petitioner respectfully submits that the decision has (as acknowledged by respondents below) been followed by the respondents in Illinois; and that there is now a direct and apparent conflict existing.

Incongruously, the panel majority then cites New York v. Burger, 482 U.S. 691 (1987) (automobile junkyard); Donovan v. Dewey, 452 U.S. 594 (1981) (coal mine); United States v. Biswell, 406 U.S. 311 (1972) (gun dealer); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (liquor dealer); and Lesser v. Espy, 34 F.3d 1301 (7th Cir. 1994) (rabbitry), to support its position (39 F.3d at 713; App. 9-10). Every one of these cases, as well as Marshall v. Barlow's Inc., 436 U.S. 307, 311-13, 316-24 (1978), and the Seventh Circuit's decisions in Serpas, 827 F.2d at 29-30, Bionic Auto Parts and Sales, Inc. v. Fahner, 721 F.2d 1072, 1078-79 (7th Cir. 1983), and Schaill v. Tippecanoe County School Corporation, 864 F.2d 1309, 1316-18 (7th Cir. 1988), twenty years of established precedent inexplicably ignored

by the panel majority, require either the statute or regulations to "carefully" limit the discretion of the searchers "in time, place, and scope." Accord: V-1 Oil Company v. State of Wyoming, Department of Environmental Quality, 902 F.2d 1482, 1485-1487 (10th Cir.), cert. denied, 498 U.S. 920 (1990), and Balelo v. Baldridge, 724 F.2d 753, 765-66 (9th Cir.), cert. denied, 467 U.S. 1252 (1984), involving searches of fishing boats. Cf. Shoemaker v. Handel, 795 F.2d 1136, 1143 (3rd Cir.), cert. denied, 479 U.S. 986 (1986), where the challenge to the regulatory scheme subjecting jockeys to breathalyzer and urine tests was upheld against a Fourth Amendment challenge because the discretion of the officials conducting the searches was appropriately limited in and by the regulations.

The panel majority then attacks the Seventh Circuit's recent decision in McGann v. Northeast Illinois Regional Commuter Railroad Corporation, 8 F.3d 1174, 1178-1186 (7th Cir. 1993), which contains an exhaustive analysis of both the issues of implied consent and constitutional limitations with respect to warrantless searches. In addition to incomprehensibly being oblivious to the danger of METRA train engineers on drugs (apparently inconsequential when compared to a horse on prohibited medication), the majority panel diminishes and degrades the extensive analysis and holdings of the case by the following summary disposition (39 F. 3d at 714; App. 11-12):

> McGann v. Northeast Illinois Regional Commuter R.R., 8 F.3d 1174 (7th Cir. 1993), on which LeRoy relies, deals with an attempt to use the public ownership of real estate as a basis to require all entrants to consent to

> search; it has nothing to do with administrative searches on the premises of tightly regulated industries. We do not think that the use of Rule 25.19 to authorize searches of licensees' vehicles at racetracks is open to serious question.

Even a cursory perusal of McGann reveals that the case is in clear conflict with the LeRoy decision. This Court should not countenance such chicanery.

In addition, Petitioner submits that the search herein was conducted on April 27, 1987; the Stewards' rulings issued April 27 to June 22, 1987, and August 4, 1988, and the IRB "Order" rendered June 6, 1987. However, almost two years earlier, on July 11, 1985, the district court, in the case of Serpas v. Schmidt, 621 F.Supp. 734, 744 (N.D. Ill. 1985), issued a Memorandum Opinion and permanently enjoined the respondent Illinois Racing Board, the former and then present members thereof,

and the Director of the Illinois State Department of Law Enforcement, stating, inter alia:

> For the foregoing reasons the Court declares: that Thoroughbred Rule 322 and Harness Racing Rule 25.19 are unconstitutional under the Fourth and Fourteenth Amendments to the United States Constitution.
>
> The Court permanently enjoins defendants from engaging in these acts pursuant to the Rules:
>
> a. conducting or authorizing searches and seizures of the persons and residential quarters of plaintiffs and the class they represent without warrants and probable cause;
>
> b. conducting or authorizing investigatory stops of plaintiffs and the class they represent without at least a reasonable suspicion, based on specific articulated facts that the person stopped is engaged in criminal activity; and
>
> c. Conditioning the issuance of occupation licenses upon applicants' forfeiture of their constitutional right to be free from the searches authorized by Rules 322 and 25.19.

The district court in Serpas based its opinion and order in part upon a determination that under U.S. v. Biswell, 406 U.S. 311, 315 (1972), Donovan v. Dewey, 452 U.S. 594, 600, 603 (1981), and other cases cited therein, the regulatory scheme was inadequate, i.e., that in terms of the "certainty and regularity" of application, IRB Rule 25.19 did not provide a "constitutionally adequate substitute for a warrant," Id. at 740, citing Balelo v. Baldridge, 724 F.2d 753, 765 (9th Cir.), cert. denied, 467 U.S. 1252 (1984). The district court also cited Bionic Auto Parts and Sales, Inc. v. Fahner, 721 F.2d 1072, 1078-79 (7th Cir. 1983), wherein the Seventh Circuit noted that:

> (T)he degree and extent of past regulation comprise but a part, albeit a substantial part, of a determination of a "reasonable expectation of privacy" under the Fourth Amendment. Otherwise, no

> protections at all would be appropriate in closely regulated industries. The Fourth Amendment requires that a determination of the "reasonableness" of the intrusion be made. Even in closely regulated industries, the inspection provisions still must be tailored to the state's proper objectives, and they must minimize the dangers inherent in the unbridled exercise of administrative discretion.

Based upon the aforesaid precedent, the district court in Serpas found the following with respect to the regulatory procedures and practices of searches conducted by the respondent IRB and Illinois State Department of Law Enforcement (621 F.Supp. at 740-741):

> In contrast to the Balelo v. Baldridge, 724 F.2d 753, 765-66 (9th Cir. 1984) regulations, however, the agents who conduct the living quarters' searches are not given written manuals, but "given instructions" on "how to carry out the searches." No further details of the nature of the instructions are offered. The search procedures include: having the agent identify

himself; signing a written consent form or where no consent is given, the individual is reported to the steward; and providing individuals with a receipt if the agents take any property. Generally, rooms are searched only when an occupant is present and the agent has permission to enter.

These practices, however, do not impose any meaningful limitations on the agents' discretion. The searches may be focused or random and are not restricted to particular items in those areas which are in plain view. Unlike the observers in Balelo, the agents here may search plaintiffs' living quarters and personal effects as extensively as they wish. Plainly, the agents have an unrestricted scope of search; requiring them to hand out receipts or consent forms does not affect or limit the agent's discretion to undertake an exhaustive search of every personal effect in an individual's room. These practices fall short as an adequate substitute for a warrant. (Id. at 740-741).

On December 19, 1986, four months before the IRB and Illinois State Department of Law Enforcement searched the

truck driven by petitioner, the Seventh Circuit affirmed the district court in Serpas, 808 F.2d 601 (7th Cir. 1986), which opinion was superseded and amended by the opinion published at 827 F.2d 23 (7th Cir. 1987), cert. denied, 485 U.S. 904 (1988), wherein the Court of Appeals held (827 F.2d at 29-30):

> The race track employees consented to the searches based on a regulatory program that required them to give their consent as a condition of employment. As we have already found, however, the regulations were not authorized by statute and were unconstitutional because neither the regulations nor the governing statute confined the discretion of the state officials conducting the searches. Thus, the validity of the employees' consent was vitiated by the fact that it was premised on the existence of the otherwise unauthorized and unconstitutional regulations.

Moreover, both opinions of the Seventh Circuit held that the regulatory scheme

fell short of adequately substituting for a warrant, stating (808 F.2d at 606; 827 F.2d at 29):

> Hence, we agree with the district court that neither the statute nor the regulatory scheme here is sufficient to except these searches from the general rule that searches conducted without the safeguard of a warrant are unreasonable and violate the Fourth Amendment, see Johnson v. United States, 333 U.S. 10, 13-14, 68 S.Ct. 367, 368-369, 92 L.Ed. 436 (1948).

Significantly and determinatively, in Hansen v. Illinois Racing Board, 179 Ill.App.3d 353 (1st Dist. 1989), involving strikingly similar facts, except that there was purportedly an informant, albeit unidentified, that was relied upon in Hansen in an unsuccessful attempt to establish probable cause, the Illinois appellate court relied upon the exact same criteria and authority upon which the district court and Court of Appeals in

Serpas based their opinions, viz., that the statute did not provide for "a sufficiently regular and certain application, as an adequate substitute for a warrant," citing Serpas, supra; U.S. v. Biswell, supra; Donovan v. Dewey, supra; and New York v. Burger, supra. As the appellate court in Hansen stated (179 Ill.App.3d at 359):

> We find, however, that Rule 25.19 fails to meet the third requirement, since the Rule does not properly limit the discretion of the inspecting officers. For instance, the Rule fails to provide the proper procedure for the officer to follow when the employee refuses to consent to or objects to part of the search, as occurred in the instant case when plaintiff refused to consent to a search of the truck. Nor does the Rule set forth the procedure for the employee to follow who decides not to consent to the requested search. In addition, the Rule fails to set forth appropriate times for inspections or the frequency of inspections, or the proper method for choosing who is subject to a search at a given time.

* * *

> We believe that in the interest of uniformity in application, the Rule should set forth what is the proper procedure in the case of refusal to consent to such a search, and further should provide for the proper times and frequency of searches. For those reasons, we believe that the Rule fails to meet the third constitutional requirement, and that the trial court was correct in finding the Rule violative of the Constitution.

Moreover, the respondents' reliance upon People v. Strauss, 151 Ill.App.3d 191 (1st Dist., December 31, 1986), is misplaced. Although rejecting the district court's conclusions, the Strauss court did not refer to the Seventh Circuit's opinion in Serpas (808 F.2d 601), issued 12 days prior. In addition, the Illinois appellate court in Strauss expressly did not find Rule 25.19 constitutional on its face. In fact, the Illinois appellate court stated (151 Ill.App.3d at 194):

> We also note that we do not decide whether Thoroughbred Rule 322 is constitutional on its face. Our decision is limited to the particular facts of this case as they apply to the defendant.

The Illinois appellate court found, under the specific facts and circumstances of the Strauss case, that the search was reasonable, noting that "this particular search occurred within the track enclosure and occurred only after racetrack officials noticed irregular betting patterns on the horse that (the criminal) defendant was riding." (151 Ill.App.3d at 198).

In the present case, there are no facts whatsoever asserted or in the record establishing any reason, justification, excuse, or cause (probable or otherwise) to search the vehicle LeRoy was driving! Without further fact-based probable cause, it is clear that the search based solely on statutory "consent" was constitutionally

invalid under federal law at the time it was conducted, which federal law had been reaffirmed by respondents themselves.

However, whether the evidence obtained as a result of the Strauss search was or was not admissible in that Illinois State Court criminal proceeding is irrelevant, because these respondents were personally "on notice," i.e., admittedly had actual notice that their actions constituted a violation of a clearly established federal law.[8] Serpas, 621 F.Supp. at 742-43, and

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[8] The Second Amended Complaint expressly alleges that the respondents knew, or reasonably should have known, that their conduct and actions were in violation of the plaintiff's rights under 42 U.S.C. Sections 1983 and/or the fourth and fourteenth amendments to the Constitution of the United States, and were "on notice" that their actions violated clearly established law (Second Amended Complt. par. 19, App. 269-270). More significantly, the respondents affirmatively admitted that they had actual knowledge of the Serpas decisions on or about the dates the decisions were issued

808 F.2d at 606-607. Finally, the Hansen court distinguished Strauss, stating (179 Ill.App.3d at 360):

> [W]e decline to follow the analysis in Strauss, since the court in that case failed specifically to address the constitutional requirement set forth in New York v. Burger (1987), 482 U.S. 691, 96 L.Ed.2d 601, 107 S.Ct. 2636, that the regulatory statute properly limit the discretion of the inspecting officers.
>
> * * *
>
> The Court in Strauss, however, failed to recognize that the court in Shoemaker, in finding the breathalyzer and urine tests constitutional, relied to a significant extent on its finding that the regulatory statute authorizing the tests left "no discretion" in the inspecting officer who conducts the searches. The court in Shoemaker found that the jockeys were subject to daily breathalyzer tests, and that the urine tests

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by the respective courts under paragraph 16 of the Second Amended Complaint. (See Defendants' Response to Plaintiff's Request for Admission, par. 16, App. 246 and 252).

> were part of a daily program at the track, which involved a random method of choosing those who were to be searched. The choice of who would be tested was made by a lottery, and in no way was left to the discretion of the searching officer. (Shoemaker, 795 F.2d at 1143.) The analysis in Shoemaker, therefore, is not contrary to the analysis employed in the instant case, and we are unpersuaded by defendant's argument that Strauss should be relied upon here.

The respondents asserted that petitioner "consented" to the search, and therefore waived his fourth amendment rights (R. 63, p. 9), notwithstanding the amendment to the complaint alleging that petitioner "consented" to the search "solely by reason that Rule 25.19 required him to give his consent as a condition to the obtainment and maintenance of his racing license" (Second Amended Complaint, par. 6, App. 257), and the express and repeated rejection of this specious

argument in Serpas v. Schmidt, 621 F.Supp. at 742-743, 808 F.2d at 606-607, and 827 F.2d at 29-30, wherein the Seventh Circuit stated that "the validity of the consent was vitiated by the fact that it was premised on the existence of the otherwise unauthorized and unconstitutional regulations." The Court of Appeals in Serpas carefully analyzed the case law relating to implied consent and reaffirmed these principles in Schaill v. Tippecanoe County School Corporation, 864 F.2d at 1312-13, stating, inter alia: "As we have noted, this consent in itself does not render these procedures any the less 'searches' subject to the fourth amendment." How many more times must the same field be replowed; this horse is dead and should be buried once and for all time.

Even after the district court's permanent injunction, the Seventh Circuit initial decision in Serpas, and the Illinois appellate court's decision in Hansen, the IRB Rule 25.19 remained and today remains devoid of any standards, definition, limitations, or other safeguards bridling the exercise of administrative discretion. And while the respondents may have been able to prevail against a motion to suppress evidence obtained under Rule 25.19, as applied, in a criminal proceeding in the Illinois courts (People v. Strauss, supra), they could have had no doubt whatsoever as to how they should have fared before the federal courts, since they already had that experience--no "shadows" in that tribunal except those of Serpas, Bionic Auto Parts, Marshall v. Barlow's Inc., Balelo v.

Baldridge, Donovan v. Dewey, and U.S. v. Biswell--going all the way back to 1972! These are the ghosts of legal precedent past that definitively and fatefully foretold the future.

As to the remaining issues, petitioner relies upon and incorporates the opinion of Judge Wellford, Circuit Judge, sitting by designation in this case and concurring in part and dissenting in part (39 F.3d at 716-718; App. 20-32), and stating, inter alia (39 F.3d at 717, n. 3):

> As to the issue of LeRoy's consent to the search in this case, this court held in McGann v. Northeast Ill. Regional Commuter R.R. Corp., 8 F.3d 1174, 1184 (7th Cir.1993), that "if there was an unlawful seizure, [the issue was whether] plaintiff's conduct was 'sufficiently an act of free will to purge the primary taint' of the unlawfulness."

In discussing the qualified immunity issue, Judge Welford further stated (39 F.2d at

717-718; emphasis in original):

> In testing defendants' claim of qualified immunity, we look to see if "constitutional standards [were] clearly established at the time in question." Rakovich v. Wade, 850 F.2d 1180, 1210 (7th Cir.), cert. denied, 488 U.S. 968, 109 S.Ct. 497, 102 L.Ed.2d 534 (1988). Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982), discussed qualified immunity in the context of whether the state official involved "could be fairly said to 'know' that the law forbade conduct not previously identified as unlawful." (emphasis added). In April of 1987, I believe that defendants reasonably might be said to have known or deemed to have realized that the conduct involved in an arbitrary search of LeRoy was unlawful or unconstitutional. Defendants were charged with knowledge that a federal district court had enjoined them from engaging in this kind of conduct as unlawful and that this court had affirmed that decision, and that, again, ratified those decisions before the suspension of LeRoy had expired. They knew, or should have known, the Illinois state trial judge had agreed with that rationale in Strauss, but this decision had been reversed on and

limited to the particular (and dissimilar) facts in that case. They may have been aware that another Illinois state judge in Hansen had found Rule 25.19 unconstitutional on its face before the suspension was lifted.

Based on these facts and the state of the law in 1987, I would find it error for the district judge to have granted a Fed. R. Civ. P. 12(b)(6) motion in favor of defendants on the basis of qualified immunity. It may be that defendants will ultimately prevail on this defense, but the dismissal was premature, I believe, under the circumstances.

I am mindful that much later, in 1991, a divided en banc court in Dimeo v. Griffin, 943 F.2d 679 (7th Cir. 1991), held "that racing officials [in Illinois] do not need person-specific cause, or warrants before they may conduct drug tests of persons associated with the sport." I do not agree that Dimeo (decided in 1991) may be retroactively applied in this case to consideration of a claim of qualified immunity to a 1987 episode, which claim must take into account the state of the law as to asserted violation of constitutional rights in 1987. While Serpas, 827 F.2d at 23, may be deemed no longer

> authoritative" by the majority (as of 1991), for the reasons I have stated, I believe it was sufficiently authoritative (and its injunction binding to preclude a Rule 12(b)(6) motion in this case.
>
> I, therefore, dissent from the Rule 25.19 holding only and the grant of qualified immunity under the circumstances.

Therefore, petitioner respectfully submits that a survey of the legal landscape at the time of the instant search, the Stewards' rulings, and IRB "Order" involved in the present case, establishes that the actions and conduct of the defendants violated clearly established federal law, established against themselves in Serpas, and set forth in other prior precedent and decisions of the district court for the Northern District of Illinois, the United States Court of Appeals for the Seventh Circuit, and this Supreme Court of the United States.

Significantly, with respect to the issue of qualified immunity in the initial Serpas case, the Illinois Racing Board argued qualified immunity as a defense under Harlow v. Fitzgerald, supra. How many times will the Illinois Racing Board be allowed to plead ignorance. In the words of the immortal Yogi Berra, "It's déjà vu all over again."

Accordingly, the Seventh Circuit's opinion in this case directly conflicts with and misconstrues and incorrectly applies this Court's applicable precedent and decisions, its own opinions and those of other Circuit Courts, and the opinion of the Illinois appellate court on the exact same issues, is erroneous, and constitutes a misapprehension of the controlling principles of Fourth Amendment law.

Lastly, the importance of this case cannot be diminished. The decision affects not only the horse racing industry and the significant public interest involved therein, including substantial revenues generated for State and local governments thereby, and all other closely regulated industries, but all other federal, state and local units of government.

If "consent" for future searches can be obtained as a precondition for a racing license, such forfeiture of constitutional rights can be required for all governmental employees and private citizens seeking governmental rights or privileges. If searches are not restricted as previously required by this Court; if there are no limits on the exercise of discretion by governmental law enforcement officials -- we are all in jeopardy.

CONCLUSION

In Elkins v. United States, 364 U.S. 206, 223 (1960), this Court recalled the following eloquent admonition:

> "In a government of laws," said Mr. Justice Brandeis, "existence of the government will be imperilled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means--to declare that the government may commit crimes in order to secure the conviction of a private criminal--would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face." 277 U.S., at page 485, 48 S.Ct. at page 575 (Dissenting opinion.)

Petitioner respectfully submits that the respondents' constitutional transgressions

should not go unrecognized or unremedied.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

LAWRENCE JAY WEINER
Counsel of Record
SCARIANO, KULA, ELLCH
AND HIMES, CHTD.
Two Prudential Plaza
180 North Stetson St.
Suite 3100
Chicago, Illinois
60601-6714
(312) 565-3100